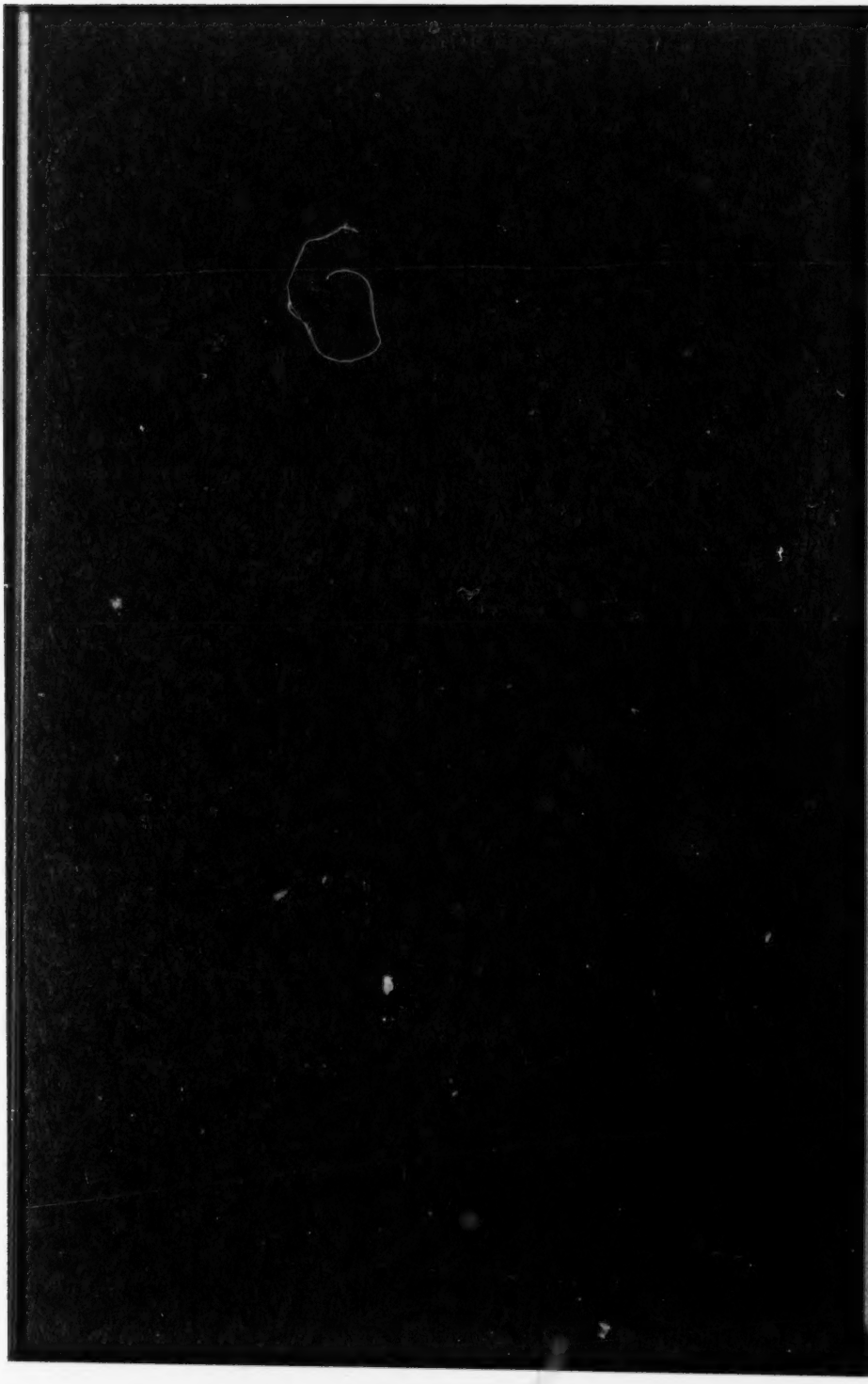

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. ——

UNITED STATES, PETITIONER

v.

MONTGOMERY WARD & COMPANY, INC.,[1] ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the District Court in this case.

OPINION BELOW

The opinion of the District Court (R. 707) has not yet been officially reported.

JURISDICTION

The judgment of the District Court was entered on January 27, 1945 (R. 725). On February 5, 1945, the Government docketed its appeal with the Circuit Court of Appeals for the Seventh Circuit (R. 729), and now files this petition for writ

[1] Hereinafter referred to as Ward.

of certiorari prior to consideration of the case by that court. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C., Sec. 347 (a).

QUESTIONS PRESENTED

(1) Whether the President had authority, under either the War Labor Disputes Act or the Constitution or both, to order the taking of possession and operation of certain properties of the defendant corporation.

(2) If the President has such authority, whether Executive Order No. 9508 was a valid exercise of that power.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The principal statutes involved are the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. (Supp. III), Secs. 1501–1511 and Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892, 50 U. S. C. App. Sec. 309. The principal executive orders involved are Executive Order No. 9508, of December 27, 1944, authorizing the Secretary of War to take over the properties involved, and Executive Order No. 9017, of January 12, 1942 (7 Fed. Reg. 237), establishing the War Labor Board. The statutes and executive orders are set forth in the appendix to this petition.

STATEMENT

The United States brought this action in the District Court for a declaratory judgment and

for injunctive relief under Secs. 24 (1) and 274d of the Judicial Code, 28 U. S. C. Secs. 41 (1) and 400. The case was submitted to the District Court on the pleadings, affidavits, and briefs and it was agreed upon argument that the hearing would be followed by final judgment, which was rendered.

The basic facts as shown by the affidavits and the opinion of the District Court are as follows:

(1) *Executive Order No. 9508.*

On December 27, 1944 the President issued Executive Order No. 9508 (Appendix, p. 39) directing the Secretary of War to take possession of and operate the plants and facilities of Ward in Jamaica, New York; Detroit, Dearborn, Royal Oak, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California, and Portland, Oregon. In this Executive Order the President made the following findings, required for the exercise of the power granted by sec. 3 of the War Labor Disputes Act: that because of labor disturbances in these properties there were existing and threatened interruptions of Ward's operations which would unduly impede the war effort and that these interruptions could be avoided only by Government operation. The Secretary of War designated Lieutenant General Somervell to act for him in carrying out the Executive Order, and on December 28, 1944, Major General J. W. Byron, by direction of

Lieutenant General Somervell, took possession of the properties.

In each of the plants specified in the Order a labor dispute existed between Ward and its employees. The National War Labor Board had taken jurisdiction in each of these disputes and had issued in each case a final order deciding the dispute and providing terms and conditions to govern the relations between the parties. In each case Ward had refused to settle the dispute on the basis of the Board's order. At the time the Order was issued a strike existed in the Detroit plant of Ward and on December 28, 1944, immediately prior to the taking of possession of the Chicago plant of Ward, a new strike occurred in the Chicago plant.

The background, legal and factual, of the President's action may be more fully outlined as follows:

(2) *Development of the procedures established by the President and the Congress for the peaceful settlement of labor disputes and for the stabilization of prices and wages during the war.*

As a result of the large number of strikes in the winter of 1940–41, the President, on March 19, 1941 (Executive Order No. 8716, 6 Fed. Reg. 1532), established the National Defense Mediation Board. This Board handled a great number of disputes. On certain occasions the parties to those disputes refused to accept the recommendations of the Board, and on three occasions the

President was required to avoid interruptions to operations deemed essential during the then existing national emergency by taking possession of plants and facilities. (A list of all seizures by Presidential Order is included in the Appendix, p. 51).

Ten days after the attack on Pearl Harbor the President, on December 17, 1941, convened a conference of representatives of labor and industry. This conference resulted in agreement that there should be no strikes or lockouts for the duration of the war, that all disputes should be settled by peaceful means, and that a tripartite board should be established to settle labor disputes. On January 12, 1942, the President, to make effective the recommendations of this conference, established the National War Labor Board by Executive Order No. 9017 (7 Fed. Reg. 237, Appendix, p. 47). This Board decided a great number of disputes, and in almost every instance its recommendations were accepted by the parties to the dispute. However, on a few occasions the Board's directives were not followed, and when serious danger to the conduct of the war impended as a result, the President took possession of particular plants and facilities. The last such incident prior to the passage of the War Labor Disputes Act was the taking of possession of the coal mines.

During the period of possession by the Government of the coal mines, Congress passed the War Labor Disputes Act on June 25, 1943, with the

express purpose of giving statutory status to the War Labor Board and of strengthening and clarifying the powers of the Board and of the President. Since its creation, the War Labor Board has handled approximately 8,000 labor disputes affecting nearly 12,000,000 workers. (Davis affidavit, R. 69, 70.) The Board has become an indispensable factor in the program of the Government for the prevention of industrial conflict and inflation and for the stabilization of the national war-time economy.

(3) *Description of the nature of Ward's business.*

Ward is one of the largest merchandising organizations in the world. It sells approximately $600,000,000 worth of merchandise annually to approximately 30,000,000 customers. It has three factories for the manufacture of paints, varnishes, fencing, and farm equipment; 640 department stores; 190 catalogue mail order offices, and 9 mail order houses. (The plant for the manufacture of farm equipment is also in the possession of the government because of an interruption in operation resulting from Ward's refusal to comply with a directive order of the Board.) The articles and materials sold by Ward include automobile supplies, building materials, farm machinery equipment and supplies including repair parts, heating apparatus, plumbing supplies, clothing and shoes, drugs, furniture, and hardware, home furnishings and drygoods. The

mail order customers of Ward are largely engaged in the production of agricultural commodities essential to the prosecution of the war and the maintenance of the civilian economy and live in rural areas where they are, in fact, dependent upon mail order houses, including Ward, for the purchase and receipt of many necessary articles of equipment and supplies. In addition many war workers whose shopping hours are limited as a result of their war work buy clothing and other essential goods by mail from Ward. Any disruption of the operations of Ward would dislocate huge inventories, a large working force and a distribution system that has as its customers nearly one-fourth of the population of the country. (Vinson and A. C. C. Hill Affidavits, R. 142, 144, 138; Findings, R. 720.)

Nearly all of the 130,000 items catalogued for sale by Ward have ceiling prices and some of them are rationed in behalf of the war effort (Vinson Affidavit, R. 142, 144). Ward has secured from the War Production Board numerous priorities on the ground that the maintenance of its business is essential to the war effort (Affidavits of Belsley and Gallagher, R. 32, 166). In addition, Ward has entered into war contracts for the sale of more than a million dollars' worth of goods to be shipped abroad under Lend-Lease (Mack Affidavit, R. 139).

Ward employs approximately 70,000 persons. Nearly 12,000 of these are employed in the plants

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and facilities of which the Army has taken possession under the Executive Order here involved. Many of these 12,000 employees are members of labor organizations affiliated with one or another of four international unions, two of which are affiliated with the Congress of Industrial Organizations and two with the American Federation of Labor (Complaint, R. 6, and Answer, R. 217).

Ward's entire business is managed, controlled and directed by its officers and executives from its administrative offices in Chicago. Its labor policies and decisions regarding labor disputes throughout the nation are determined and controlled by the Company, the individuals named as defendants, and other officers and agents from its principal office in Chicago, Illinois.

(4) *The adverse effect on the war effort of Ward's noncompliance with directives of the War Labor Board.*

During the past two and one-half years, 21 labor disputes, involving over 14,000 employees, between Ward and certain labor organizations have been considered by the War Labor Board.[2] The Board has issued final orders in disputes involving 12,000

[2] On April 25, 1944, the President took possession of certain Chicago properties of Ward under Executive Order No. 9438 because of the labor dispute then in existence. Legal proceedings were instituted in the Federal District Court in Chicago to test the validity of this action, but after an election to select the bargaining agent, possession was relinquished and the case, on suggestion of the Government, was dismissed as moot.

workers at properties of which possession has been taken under Executive Order No. 9508. (Davis affidavit, R. 69.)

Ward has consistently refused to abide by the directives of the Board and, since the agreement between labor and management to avoid strikes and lockouts can only be maintained by compliance with procedures for peaceful settlement, Ward's conduct threatens to destroy the entire system for the settlement of war-time labor disputes. In his affidavit in this case, James F. Byrnes, Director of the Office of War Mobilization and Reconstruction, states that the "continued refusal of Montgomery Ward & Co., Incorporated, to conform to these procedures for the adjustment of war-time labor disputes and for the maintenance of wage and price stabilization threatens to disrupt these procedures, and that the Company's conduct, if allowed to continue, will seriously interfere with the successful prosecution of the war." (R. 350.)

The affidavits of Fred M. Vinson, Director of the Office of Economic Stabilization (R. 142, 146, 147), and of William H. Davis, Chairman of the National War Labor Board (R. 69, 70), both state that Ward's policy will probably destroy the present program for the settlement of war-time labor disputes.

Strikes against Ward may rapidly spread throughout industry. The affidavit of Mr. Davis (R. 69, 76) shows that on many occasions strikes in one plant have spread throughout a community, and

other affidavits show that there was grave danger that the strike in Detroit existing at the time of the issuance of Executive Order No. 9508 would spread throughout that important war production center (Affidavits of Anhut, R. 160, Sikorski, R. 212, 213, Nelson, R. 205, Nast, R. 209, Scholle, R. 204, and McCreedy, R. 203). There is also an affidavit by the Regional Director of the C. I. O. for the region of Michigan and Northwestern Ohio stating that the failure to settle Ward's labor disputes will have an adverse effect on the referendum being taken this month among automobile workers on the question of the no-strike pledge (Affidavit of Scholle, R. 209).

Even if the strikes of Ward should not spread, any prolonged interruption of Ward's own business would adversely affect war production. Millions of essential workers obtain from the company working tools, equipment and goods essential to their well-being and, particularly, Ward supplies farm workers with agricultural tools, equipment and many other necessities. (Affidavits of Fred M. Vinson, R. 142, and A. C. C. Hill, R. 138.)

(5) *The legal proceedings.*

On December 28, 1944, shortly after taking possession of Ward's facilities hereinabove referred to (supra, p. 3), the Government instituted this action for a declaratory judgment that its action was valid and legal, and praying an injunction against interference with the Government's lawful possession.

The District Court held that the taking of possession was illegal. It held that Section 3 of the War Labor Disputes Act did not authorize such action by the Government since the Company is engaged in retail selling and distribution and therefore is not equipped for production within the meaning of that section. It held that the Act was "not an integrated piece of legislation," and it appears to have concluded that accordingly the meaning given to "production" in Section 3 need not give internal coherence to the entire statute. It seems to have held further that the President's independent constitutional power to take property in war-time existed only "within the actual theatre of military operations" and then only if the seizure is "essential for the use of the naval or military forces." Notwithstanding this conclusion, the Court seems to affirm that the taking of possession of the coal mines was a valid exercise of the President's constitutional powers. The court was silent on the contention of the government that its action here was an exercise of the combined war powers of the Congress and the Executive.

The court stressed the reluctance with which it arrived at its conclusion, stating that (R. 719) "it may well be that an interruption at this time in the flow of any goods may directly or indirectly affect our armed forces, thereby resulting in added loss of life or prolonging the war." The court entered a stay order, thus permitting the Govern-

ment to continue in possession pending appeal. (R. 728).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that the War Labor Disputes Act did not authorize the action taken by the President.

(2) In failing to hold that the War Labor Disputes Act in conjunction with the powers of the President under the Constitution authorized the action taken by the President.

(3) In holding that the Constitution, without regard to the War Labor Disputes Act, did not authorize the action taken by the President.

(4) In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANCE OF THE QUESTIONS PRESENTED

This is the first case to come before this Court involving the powers of the Government under Section 3 of the War Labor Disputes Act. It is likewise the first case in this war involving the President's comparable powers under the Constitution. It presents as well the nature of the combined war powers of the President and the Congress. It raises questions of immediate and large significance in the conduct of the war.

The President under Executive Order No. 9508 declared that "the war effort will be unduly impeded or delayed by these interruptions;" and

"that the operation of other plants and facilities essential to the war effort is threatened by the labor disturbances at the plants and facilities of Montgomery Ward & Co., Incorporated." That the company's conduct will seriously interfere with the successful prosecution of the war has been attested by the affidavits of the Director of War Mobilization, the Director of Economic Stabilization, and the Chairman of the War Labor Board.

Unless the decision of the District Court is reversed, the Government has no means under existing law of preventing the consequences apprehended by the President and these other responsible officials. The Government would stand stripped of power to deal with consequences which might develop into the most serious crisis in the history of the war outside, but connected with, the area of actual military operations in the field.

It is true that, even as interpreted by the District Court, the War Labor Disputes Act and certain other statutes give the President authority to take possession of many kinds of properties when necessary to prevent interruptions of war production by labor disputes. Nevertheless, if the decision below prevails, there are important industries not covered by the existing statutes. The Government would have no authority to prevent interruptions of those industries by labor disputes. Electric and water distribution sys-

tems are one example. Harbor and port facilities, such as wharves, and central storage and warehousing facilities are others. Under the District Court's decision, the Government lacks authority to prevent interruptions of such operations.

It is submitted that the resolution of the questions thus presented is of such immediate importance as to warrant consideration by this Court now. The case is more exigent than many others in which the Court has exercised its discretionary authority to issue a writ of certiorari prior to decision by the Circuit Court of Appeals.[3] If certiorari is not now granted there is serious question whether the case could reach this Court at the present term. Moreover, the case presents no strong countervailing reasons for postponing consideration by this Court. No questions of local law are involved. Nor does the case turn upon any substantial issue of fact. There is no significant controversy over the actual nature of respondent's business activities. Nor can there by any real dispute as to the facts which led to the exercise of the power of the President under the War Labor Disputes Act and the Constitution. And if it be assumed that the factual determinations

[3] *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330; *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Hood & Sons, Inc.* v. *United States*, 307 U. S. 588; *Ex parte Quirin*, 317 U. S. 1.

of the President are reviewable, the executive order and the affidavits contained in the record make it clear that those determinations are well founded. The essential issues, therefore, are of law: whether respondent is engaged in production within the meaning of the War Labor Disputes Act, whether the case presents a proper application of the war-time powers of the Congress and the President, and whether the President has any power under the Constitution, in the conditions of modern total war, to take possession of property outside the actual scene of military operations.

Unless the decision below is now reviewed serious uncertainty will cloud the action of the Government with respect to both the continuing possession of respondent's plants and the meeting of future emergencies elsewhere. Substantial sums are being expended and substantial liability is being risked. Every consideration of sound management calls for early removal of the uncertainties surrounding the right of possession. Beyond this, as the President and his advisors have concluded, there is serious danger that the disturbances at respondent's plants may spread, and there is evidence in the record that the failure of the Government to cope with this situation may result in the abandonment of the no-strike pledge itself, as well as in the collapse of the en-

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tire existing system of wartime control of labor disputes.

II. THE DECISION BELOW WAS ERRONEOUS

The decision below, we believe, takes an erroneously narrow view of the powers of the President under the Act and under the Constitution and of the combined powers of the President and the Congress. We shall briefly indicate the Government's position on these issues.

(1) *The Act authorizes the President's action.* Section 3 of the War Labor Disputes Act provides that the President may take immediate possession of any "plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith" upon three conditions. The President must find (1) that there is an interruption or threatened interruption of the operations of the plant, mine or facility as a result of a strike or other labor disturbance; (2) that the war effort will be unduly impeded or delayed by such interruption; and (3) that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort.

The question under this branch of the case is whether Ward is equipped for "production," since there can be no serious doubt that the properties are plants or facilities, *Manufacturers'*

Company v. *Fleet Corp.*, 264 U. S. 250, 254–255; *Briggs Mfg. Co.* v. *United States*, 30 F. (2d) 962 (D. Conn.), or that the articles or materials which it "produces" are useful in connection with the war effort.

The Government contends that Congress has used the word "production" in the War Labor Disputes Act to include all steps in the preparation, construction, assembly, maintenance, storage, repair, distribution and making available of articles or materials "which may be required for the war effort or which may be useful in connection therewith." We support this contention by reference to the legislative history of the Act and to the remainder of the statute since the word derives its meaning from the full context of the statute and must be given meaning in the light of the mischief sought to be corrected and the end to be attained. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 124, and cases cited therein.

The dominant factor in the legislative history of this Act is that it was passed at a time when the coal mines had already been taken by the President and after the President had on numerous other occasions exercised a power to take possession of plants and facilities as a means of preventing an interruption to the war effort due to labor disputes. The power that the President had exercised prior to the passage of the Act was the power to take possession of any plant or

facility that was necessary or useful in connection with the prosecution of the war if the action was required to prevent interference with the war effort or, prior to the war, with the national defense. The object of the Act was to confirm and ratify this power in the President, not to limit it. The legislative history is replete with evidence that the Congress recognized that the President had been exercising an asserted constitutional power and that Congress meant to remove any possible doubt as to the existence or validity of the exercise of that power by giving complete legislative ratification thereof. Thus Senator Connally, the author of the bill, said (89 Cong. Rec. 3807):

> There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to au-

> thorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

Senator Connally also said (89 Cong. Rec. 3885):

> My purpose in this bill is to give the President specific authority, to put the Congress squarely behind him, and to confirm and ratify in him the power to do the things which time has demonstrated must be done.

When the conference report on the bill was before the House of Representatives, Representative Harness, one of the managers for the House, described section 3 as follows: (89 Cong. Rec. 5731):

> Section 3 defines the powers of the President to take possession of property, and this is the heart of the Senate bill, with which I am sure all of you are familiar. This authority to seize extends quite comprehensively to any plant, mine, or facility which may be required for the war effort, or which may be useful in connection therewith * * *

The remaining portions of the Act require the same broad interpretation of Section 3 as that which the legislative history gives it. Thus, Section 8 requires that in order that the President may be informed of all labor disputes which

"threaten seriously to interrupt war production" the employees of any "war contractor" must take certain steps in connection with any labor dispute which may arise. The term "war contractor" is broadly defined by Section 2 of the Act, so as to cover one engaged in activities like those of Ward. In other words, for the purpose of Section 8, Ward is engaged in "production."

That the interpretation given Section 3 by the district court is in conflict with the basic plan and purpose of the statute read as a whole is further shown by Section 7. That section ratifies the executive order establishing the War Labor Board and specifically gives the Board jurisdiction over any labor disputes "which may lead to substantial interference with the war effort." This is the sole limitation on the Board's jurisdiction. Yet the Board has no power to enforce its orders, *National War Labor Board* v. *Montgomery Ward & Company,* 144 F. (2d) 528 (App. D. C.), certiorari denied November 13, 1944, No. 538, October Term, 1944; *Employers Group of Motor Freight Carriers, Inc., et al.* v. *National War Labor Board, et al.,* 143 F. (2d) 145 (App. D. C.), certiorari denied October 9, 1944, No. 350, October Term, 1944. The lower court, by holding that the President's power under Section 3 is not as broad as the jurisdiction of the Board under Section 7, has necessarily declared that there is a large number of cases over which the Board has jurisdiction but concerning which the President can take no action

at all if operations are interrupted which may lead to substantial interference with the war effort.

(2) *The Constitution authorizes the President's action.* The District Court appears to have held that while the President has an independent constitutional power to take possession of property in time of war, this power can be exercised only in the theatre of actual military operations, notwithstanding the fact that the Court seems to state that the taking of possession of the coal mines outside the theatre of military operations was valid. The Government contends that under the conditions of the present war the President's power to take possession of property, subject to constitutional requirements of just compensation, is not limited to property having a mere physical or geographical relation to the actual scene of military operations. The gravity of an emergency requiring the taking of possession of particular property in order that the prosecution of the war shall not be impeded may depend upon factors other than the location of the property.

Both the cases and our constitutional history, under conditions less urgent than those flowing from the nature of the present war, afford numerous examples of the existence of a power residing in the President to take possession of property, by virtue of his office as Commander-in-Chief of the Army and Navy and his responsibility faithfully to execute the laws. The power in conditions

of emergency is recognized in *Mitchell* v. *Harmony,* 13 How. 115; *United States* v. *Russell,* 13 Wall. 623; the *Prize Cases,* 2 Black 635; *United States* v. *Pacific Railroad,* 120 U. S. 227; *Roxford Knitting Co.* v. *Moore & Tierney,* 265 Fed. 177, 179 (C. C. A. 2); *Ken-Rad Tube & Lamp Corp.* v. *Badeau,* 55 F. Supp. 193, 197 (W. D. Ky.); and *Alpirn* v. *Huffman,* 49 F. Supp. 337, 340 (D. Neb.). The power was exercised by President Lincoln in 1861 when he took over a branch of the Baltimore & Ohio Railroad without express statutory authority and by President Roosevelt in the numerous seizures listed in the appendix prior to the passage of the War Labor Disputes Act (*infra,* p. 51).

The cases have put no limitation on the President's constitutional powers in terms of the relation of the particular property to the theatre of actual military operations. The distinction growing out of the situs of the property goes to the responsibility of the Government to make compensation; see, for example, the *Pacific Railroad* case, *supra,* p. 238. Once the obligation for compensation is recognized and the conditions of necessity with respect to the particular property are sufficiently strong, the distinction does not have controlling importance.

It is difficult to imagine how, in the circumstances of modern war, an important constitutional war power, heretofore recognized, could be limited to the actual theatre of operations. The

conduct of modern war is not itself limited by geography. As Judge Learned Hand said in upholding the seizure during World War I of the International Cable Lines under Congressional authority, "it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theatre of military operations." *Commercial Cable Co.* v. *Burleson,* 255 Fed. 99, 104 (E. D. N. Y.) (reversed on the ground that the case had become moot by the time it reached the Supreme Court, 250 U. S. 360); see also *United States* v. *City of Chester* 144 F. (2d) 415 (C. C. A. 3).

(3) *The taking is valid as an exercise of the combined war powers of the President and the Congress.* While the Executive Order and the action taken pursuant thereto were authorized, in the view of the Government, under the Congressional power, or under the Constitutional power, they are also valid as an exercise of the combined war powers of the Congress and the President.

In Section 6 of the Act the Congress has imposed criminal penalties for interference by strike, lockout, or otherwise with the operation of "any plant, mine or facility * * * in the possession of the United States," without specific limitation to those taken under Section 3. This provision was enacted into law while the Government was in possession of the coal mines under Presidential authority alone. Congress thus ap-

proved the Presidential action based on prevention of interruptions to the war effort and combined its own war powers with those of the Executive to establish the authority to permit possession and operation by the Government of facilities the uninterrupted operation of which was deemed essential to the prosecution of the war. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81, 91, 92; *Korematsu* v. *United States,* No. 22, decided December 18, 1944. The standards for the exercise of this combined power are not limited by the description of facilities contained in Section 3, even if the district court's construction of that section were correct.

The Government's contention that the taking was valid, whether under the statute or the Constitution or under the combined war powers of the Congress and the Executive, is fortified further by the fact that Congress has acquiesced in the legal authority of the President to take possession of the plants and facilities of Ward itself. In April 1944 the President by Executive Order No. 9438 directed the Secretary of Commerce to take possession of the plants and facilities of Ward in Chicago. Committees of both houses of Congress investigated that seizure and in the hearings before the House Committee both the Attorney General and the Chairman of the National War Labor Board urged the Congress to change the Act if it disagreed with the interpretation

given the statute by the President.[4] A majority of the House Committee concluded that the taking of the properties of Ward was authorized by the statute while a majority of the Senate Committee came to the opposite conclusion.[5] The House Committee specifically urged that all who disagreed with its conclusions should offer amendments to the Act. As a result of the previous seizure and its consideration by Congress four separate measures were proposed in the House of Representatives for the purpose of restricting the powers of the President. In the seven months which intervened prior to the action here involved the Congress took no action on any of these bills.[6]

(4) *The President's findings are valid.* If the President has authority as a matter of law to take possession of the properties of Ward either under the Act or the Constitution, or the two together, the sole remaining question is whether

[4] Hearings before the Select Committee of the House to investigate seizure of Montgomery Ward & Co., 78th Congress, 2d Sess., pp. 10, 53, 132.

[5] H. Rep. No. 1904, 78th Cong., 2d Sess.; Rept. of the Senate Subcommittee of the Committee on the Judiciary on Executive Order 9438, 78th Cong., 2d Sess.

[6] The bills, the sponsors of the bills, the dates of their introduction, and the points at which they appear in the Congressional Record are as follows: H. R. 4716, Representative Hoffman, May 1, 1944, 90 Cong. Rec. 3805; H. Con. Res. 83, Representative Crawford, May 4, 1944, 90 Cong. Rec. 4039; H. R. 4758, Representative Compton, May 5, 1944, 90 Cong. Rec. 4088; H. R. 4769, Representative Gathings, May 8, 1944, 90 Cong. Rec. 4168.

the particular facts justify the President's exercise of that authority on this occasion. Under the statute he may take possession "whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort * * *." It is assumed by the Government that the conditions thus required are at least as extensive as those which would create an "emergency" sufficient to justify the exercise of the President's constitutional power.

In Executive Order No. 9508 the President specifically did find and proclaim, after investigation, the existence of all three of these conditions. If the Court deems these determinations of the President reviewable, it need only be pointed out that the findings of the President are supported not only by his own informed judgment but also by the affidavits of the Director of War Mobilization, the Director of the Office of Economic Stabilization, the Under Secretary of War, the Under Secretary of the Navy, and the Chairman of the War Labor Board.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1945.